

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2566

To be argued by
LAWRENCE B. PEDOWITZ

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2566

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID GARTNER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX FOR THE UNITED STATES
OF AMERICA**

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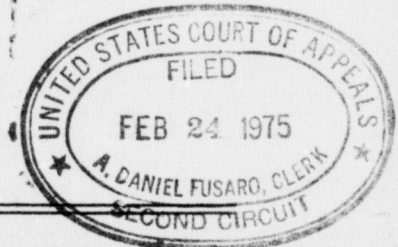




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FOR THE SECOND CIRCUIT

Docket No. 74-2566

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID GARTNER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Gartner appeals from a judgment of conviction entered on September 23, 1974, after a five day non-jury trial before the Honorable Charles E. Stewart, United States District Judge.

Indictment 72 Cr. 1024, filed on September 15, 1972, charged defendants David Gartner, Steve Gary Diskin, Neil Veenstra, Stanley Silverstein, Thomas Parashac, Chen Kali, Edward Charles Baletti, a/k/a "Jesse Bambu", and Gregory Charles Otte in Count One with conspiring to violate the federal narcotics laws in violation of Title 21, United States Code, Section 846. Count Two charged all defendants, except Kali, with distributing and possessing with the intent to distribute approximately 138.2 grams of cocaine on July 10, 1972, in violation of Title 21, United

States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).^{*} Counts Three and Four charged the defendants Gartner and Diskin, respectively, with giving false testimony before a Federal Grand Jury in violation of Title 18, United States Code, Section 1623.

On December 18, 1972, defendants Gartner and Diskin pleaded guilty to an Information 72 Cr. 1353, which charged them with conspiring to violate the federal narcotics laws in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846. It was agreed that the Government would seek an order of *nolle prosequi* as to Gartner and Diskin on Indictment 72 Cr. 1024. On June 15, 1973, Gartner moved to withdraw his guilty plea, and, after hearings on the motion held on June 26, 27 and 28, 1973, Judge Stewart granted Gartner's motion by an order entered on July 31, 1973.

Trial on Indictment 72 Cr. 1024 commenced as to Gartner on September 3, 1974 and continued on September 4, 9, 10 and 11, 1974. On September 23, 1974, Judge Stewart found Gartner guilty on Counts One, Two and Four of the Indictment.

On November 11, 1974, Judge Stewart sentenced Gartner to a term of imprisonment of six months on Count One to be followed by a three year special parole term. On Counts Two and Four the imposition of sentence was suspended and Gartner received three years probation. All the sentences are to run concurrently.

Gartner is free on bail pending this appeal.

^{*} The defendants Veenstra, Silverstein, Parashac, Baletti and Otte pleaded guilty.

Statement of Facts

The Government's Case

On June 22, 1972, Special Agent John H. Diez of the Bureau of Narcotics and Dangerous Drugs (BNDD), acting in an undercover capacity, met with an individual by the name of Greg Otte at a boutique in Wayne, New Jersey. Otte told Agent Diez that he could supply one-half pound of cocaine for \$5,500 and that his connection for the cocaine was an individual by the name of "Donald." On July 5, 1972, Agent Diez met with Otte in Fort Lee, New Jersey, where Otte gave Diez a sample of cocaine which Otte said had come from Donald. The following day, July 6, 1972, Otte took Agent Diez to the home of Donald Brandt in Maywood, New Jersey, where Brandt told Diez that a half pound of cocaine could be supplied within a few days.

On July 10, 1972, Agent Diez again met with Otte in Wayne, New Jersey. Otte telephoned Brandt, and after advising Agent Diez that Brandt was unable to supply the cocaine, Otte proposed an alternate source. He and Agent Diez proceeded to the home of Neil Veenstra in Wayne, New Jersey, where Diez was introduced to Veenstra and Martha Parashac. Veenstra stated that he had a connection whom he identified as Tom Parashac, Martha's brother, who could supply a half pound of cocaine, but that the delivery would have to take place in Queens, New York. Agents Diez and Jorgenson then followed Veenstra, Martha Parashac and Otte to Queens where all entered an apartment and met with Stanley Silverstein and Thomas Parashac. Thomas Parashac stated that his source of supply was in Manhattan, and Agents Jorgenson and Diez, together with Otte and Veenstra in one car, then followed Thomas Parashac and Silverstein to 85 Walker Street in lower Manhattan. Agent Diez accompanied Parashac and Silverstein to a loft at 85 Walker Street where Edward Baletti, a/k/a "Jesse Bambu", showed Agent Diez five

packages which Baletti said contained the cocaine. Baletti also stated that the price would be \$5,500. On the pretext of going out to discuss the matter with his partner, Agent Diez went downstairs to meet with the other agents. Otte and Veenstra, who had remained downstairs, were then arrested. Diez and other agents returned to the apartment where Silverstein, Baletti and Parashac were placed under arrest and the cocaine was seized. (Tr. 44-53, 57-60, 437; GX 3c, 3d).

While the agents were in Baletti's apartment, the phone rang. Special Agent Jeffrey Hall answered the phone, while Special Agent Diez listened on an extension phone. The caller identified himself as "Dave" and asked to speak to Jesse (Baletti). Agent Hall told Dave that Jesse was busy, and Dave said he would call back in fifteen minutes.

Baletti, a/k/a "Jesse Bambu," agreed to cooperate, and when the phone rang again, Baletti, with Agent Hall standing next to him, and Agent Diez on the extension, answered the phone. The caller identified himself as Dave and asked Baletti if everything had gone well. Baletti told Dave that it had. Baletti asked Dave to come to the apartment, but Dave refused and arranged with Baletti to meet on a street corner, a few blocks away. Baletti and Agent Jorgenson, followed by other agents, went to meet Dave at the corner of Broadway and Canal Street. When they arrived at the location, defendants David Gartner and Stephen Diskin approached Baletti and Agent Jorgenson. The four had a brief conversation before Gartner and Diskin started back to their car where they were placed under arrest. (Tr. 53-56, 347-353).

On August 9, 1972 after his arrest, the defendant Gartner, represented by counsel, appeared before a Federal Grand Jury where he denied ever identifying himself as Dave during the two phone calls that he admitted making to Baletti on July 10, 1972. Gartner also denied before

the Grand Jury that he had asked Baletti ("Jesse Bambu") if everything had gone off as planned or words to that effect. He further denied asking Baletti, "Did everything go well tonight." (Tr. 440-442; GX 1, at 18-20).

At trial, Stephen Diskin testified that he first met the defendant Gartner in the latter part of 1968 or early 1969 and that in 1971 he and Gartner became associated in the photography and cocaine businesses; that he and Gartner engaged in approximately four or five cocaine transactions during the period from late 1971 until the time of their arrests in July 1972. Diskin also testified that, after the first cocaine transaction, he and Gartner on three or four occasions purchased narcotics in one-eighth kilogram amounts from Raymond Matteo and that he and Gartner sold Baletti cocaine on three or four occasions from Gartner's apartment (Tr. 99-108).

Diskin further testified that in July 1972 he and Gartner picked up an eighth of a kilogram from Matteo which they brought to Gartner's apartment. Gartner called Baletti, and Baletti came to Gartner's apartment and inspected the cocaine. Baletti left Gartner's apartment with the cocaine and promised payment within three or four days. The following day Baletti returned with \$1,600 which he gave to Gartner and which Gartner and Diskin then paid to Matteo's partner, a Mr. Schillman. (Tr. 108-109).

On July 10, 1972, Diskin was in Gartner's apartment when Gartner received a phone call from Baletti. After the call Gartner told Diskin that Baletti had stated that the cocaine would be sold that night, that Baletti would pay the balance owing on the cocaine and that Baletti wanted Gartner to come by his house at 10 or 11 o'clock that night. (Tr. 109-111).

Gartner and Diskin went downtown that evening, and Gartner called Baletti from an outdoor phone booth. Diskin

testified that the call lasted about two or three minutes and that after the call Gartner told him that something sounded fishy. Gartner, according to Diskin, then placed a second phone call and afterwards told Diskin that they were to meet Baletti nearby. Gartner and Diskin went to meet with Baletti and both were arrested. (Tr. 111-113).

Baletti testified that he had approximately five cocaine transactions with Gartner during 1972 and that on July 10, 1972 he was arrested in possession of cocaine which he had previously received from Gartner. Baletti also testified that he had given Gartner a partial payment of \$500-\$800 for the cocaine and that on July 10, 1972, he was to pay Gartner the balance. Baletti further testified that he received a call from Gartner in his apartment after his arrest in which Gartner asked if everything had gone okay. (Tr. 292-297, 305).

The Defense Case

Robert Bloom, Gartner's trial attorney, took the stand and testified that Diskin never told him that Diskin and Gartner went downtown to pick up payment for the narcotics on July 10, 1972, and that Diskin had told him that the agents had made a tape of the meeting on Broadway and Canal Street on July 10, 1972. Bloom testified that he had never offered Diskin a marijuana cigarette.* Bloom further testified that another Government witness, Thomas Parashac, had stated in the hall outside the courtroom that he was sure it was David Duffy who was "Jesse Bambu's" drug partner.**

* Diskin testified on cross-examination that he had told Mr. Bloom that he and Gartner met with "Jesse Bambu" to pick up money, and that Mr. Bloom had at one time offered him a marijuana cigarette. (Tr. 124-128, 137-138, 186-194).

** Parashac testified on direct examination that on July 10, 1972, Baletti told him that he had to pay his man Dave. On cross-examination, Parashac denied that he assumed the Dave to be Dave Duffy. (Tr. 284-292).

The Recording of Appellant's Conversations With His Attorney

Some five months after Gartner had pleaded guilty to the charges contained in Information 72 Cr. 1353, and while awaiting sentence, Stephen Diskin, Robert Bloom, the appellant's attorney, and the appellant met at Diskin's home. The meeting on May '0, 1973 had been arranged at the request of Bloom and the appellant, though Diskin had requested that the meeting take place in his apartment. Some months before the meeting took place, both the appellant and Diskin had agreed to cooperate with the Government by providing information concerning narcotics dealers.

The May 30, 1973 conversations in the apartment among Bloom, Diskin and the appellant concerned whether or not the appellant would withdraw his plea of guilty to the information and also the nature and degree of cooperation Diskin and the appellant had provided to the BNDD. (Tr. 20-21) Unbeknownst to Bloom and the appellant, but with the permission of Diskin and the approval of the United States Attorney's Office, Special Agent Jeffrey Hall of the BNDD was concealed in the apartment and taped these conversations.

Five days before the instant trial began, Mr. Bloom was advised that the May 30, 1973 conversations had been taped. (Tr. 3-4). At that time, Bloom was given an opportunity to listen to the tapes. (Tr. 4).

Before the trial commenced, Bloom raised the question of the propriety of the tape recordings. (Tr. 5). With Bloom's consent, it was agreed that this matter would be disposed of as a post-trial matter. (Tr. 24). The appellant then waived trial by jury. (Tr. 29).

The first reference at trial to the taping of the May 30, 1973 meeting came during Mr. Bloom's cross-examination

of Stephen Diskin. Mr. Bloom inquired (1) whether Diskin had heard the tape recording of the meeting (Tr. 179); (2) where the recording device had been placed in the apartment (Tr. 180); (3) what the recording unit looked like (Tr. 180); and finally (4) what the substance of the conversations in the apartment had been. (Tr. 182-184). Diskin testified that Mr. Bloom had told him and the appellant that they had better get their stories "straight." (Tr. 183). Bloom inquired whether they had been discussing whether or not the appellant knew a "Mike Morton." Diskin replied that he could not recall. (Tr. 183).

The next reference to the taped conversations occurred during Bloom's cross-examination of Agent Hall. (Tr. 380). In reply to Bloom's questions, Agent Hall stated that he had taped the meeting because he was suspicious of Bloom's motives in asking for a meeting with Diskin, who was a cooperating informant at that time. (Tr. 381). Hall stated he suspected Bloom would ask Diskin to lie about appellant's purported cooperation with the BNDD. (Tr. 381-382). Hall further stated that Bloom became aware during the conversations that appellant intended to lie about his cooperation. (Tr. 382). This line of questioning came to a halt when the Court asked:

"Well it seems to me that this question of whether or not they tried to interfere with [Mr. Bloom's] duties and whatever your responsibilities to that is something that does not go to the question of whether or not Mr. Gartner is guilty or not guilty. Am I right about that?"

Bloom replied, "You're right about that, yes." (Tr. 385-386).

During the cross-examination of attorney Bloom, he stated that the purposes of the May 30, 1973 meeting were to determine the extent of the appellant's cooperation; to decide whether to withdraw appellant's guilty plea; and

to ascertain whether Diskin would testify for appellant if the plea was withdrawn. (Tr. 517-518). Bloom then testified that as a result of the meeting he began to have doubts about the extent of the appellant's cooperation with the Government. (Tr. 518). Bloom further stated that he had subsequently told Judge Stewart during the hearings concerning the withdrawal of appellant's guilty plea that the appellant had indeed cooperated with the Government. (Tr. 518-519). Bloom then testified that he was not clear whether or not he left the May 30, 1973 meeting with the understanding that appellant had not been cooperating. (Tr. 520). The Government, without objection, then sought to refresh the witness' recollection by showing him a transcript of the May 30th conversation. (Tr. 520-521). With Mr. Bloom then stating that his recollection was now refreshed, he testified that his understanding had been that the appellant was cooperating. (Tr. 522). While one additional attempt was made to use the transcript to refresh the witness' recollection, Bloom's objection to this questioning was sustained. (Tr. 523-531).

The Post-Trial Decision of the District Court

After the verdict had been returned by Judge Stewart, Mr. Bloom renewed his application with respect to the taping of the May 30, 1973 meeting.

In a decision filed November 22, 1974, Judge Stewart denied the appellant's motion to set aside the verdict based on the taping of the May 30, 1973 meeting. The Court found that appellant had shown no prejudice resulting from the intrusion. (A. 19). The taped conversation did not, the Court found, concern the facts of the case at all. *Id.* Moreover, the Government's use of the transcript was found to have not affected Mr. Bloom's testimony "in any material way." *Id.* Finally, the recording of the conversation was found to have not affected appellant's motion to withdraw his guilty plea, since the Court had permitted it to be withdrawn (A. 19-A. 20).

ARGUMENT

POINT I

The Government's conduct in recording a conversation among appellant, his attorney and an individual known to be cooperating with the Government, was justifiable and does not warrant the application of a *per se* rule requiring the reversal of appellant's conviction and dismissal of the indictment.

Appellant's sole argument on appeal is that the Government's recording of the May 30, 1973 conversations among Stephen Diskin, who was a Government informant, appellant and his attorney constituted "lawless conduct" and "a blatant encroachment upon the attorney client relationship," requiring reversal of appellant's conviction and dismissal of his indictment. The record establishes that Gartner's constitutional rights were not transgressed by the recording of the conversation and that the Government's conduct was not of a nature warranting the "punishment" sought by appellant, namely, reversal of his conviction and dismissal of the indictment. See *United States v. Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

The May 30, 1973 conversations were recorded with the consent of Stephen Diskin in his apartment. Since the recordings were the product of the consent of a third-party participant, appellant has suffered no violation of his Fourth Amendment rights. *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966); *United States v. Bonanno*, 487 F.2d 654, 657-58 (2d Cir. 1973); *United States v. Fanning*, 477 F.2d 45, 48 (5th Cir.), *cert. denied*, 414 U.S. 1006 (1973). Moreover, appellant's Fifth Amendment privilege against compulsory self-incrimination was not infringed as a result of these

recordings, since his statements were not the subject of any Government "compulsion." *Hoffa v. United States, supra*, 385 U.S. at 303-04.

Nor was there any violation of Gartner's Sixth Amendment rights. Since Mr. Bloom was present during these conversations, appellant's post-indictment statements were not made in the absence of counsel. See *Massiah v. United States*, 377 U.S. 201 (1964). Rather, any assertion of a Sixth Amendment violation would have to be based on the ground that the Government's monitoring of these conversations impaired the effectiveness of the assistance of appellant's counsel. *Glasser v. United States*, 315 U.S. 60, 76 (1942); *Coplon v. United States*, 191 F.2d 749, 757-59 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952). However, the recordings do not relate to trial strategy nor to the facts underlying the offense for which appellant now stands convicted.* Accordingly, any claim that these recordings deprived appellant of effective assistance of counsel is patently devoid of merit. See *Taglianetti v. United States*, 398 F.2d 558, 570 (1st Cir. 1968), *aff'd per curiam*, 394 U.S. 316 (1969).

Appellant is thus constrained to argue that the Government's actions in recording these conversations were of such a shocking nature as to violate due process and mandate the relief requested in order to deter the Government from such action in the future.

Where Governmental conduct in intruding upon attorney-client deliberations has been found to constitute conduct "ruthless beyond justification," "a *per se* rule" has been applied to void defendants' convictions and order new trials free of any taint. *United States v. Rosner, supra*, 485 F.2d at 1227. See also *Hoffa v. United States, supra*,

* The Government has reprinted in a separate appendix the transcript of the May 30, 1973 meeting.

385 U.S. at 306. The Government's conduct has been found to have fallen below this line of acceptability and new trials have been ordered where attorney-client telephone conversations had been wiretapped, *Coplon v. United States*, *supra*, 191 F.2d 749; where an informer, not known to be cooperating with the Government, had been planted in the defense camp, *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); and where a sham defendant had been brought to trial with other defendants, *United States v. Rispo*, 460 F.2d 965 (3d Cir. 1972); *United States v. Lusterino*, 450 F.2d 572 (2d Cir. 1971).^{*} But when the Government's conduct has not been avowedly corrupt, the courts have applied a less rigid rule—one which measures the granting of relief based on whether the defendant has suffered actual prejudice as a result of an intrusion into attorney-client conversations. *United States v. Arroyo*, 494 F.2d 1316 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (1974); *United States v. Rosner*, *supra*, 485 F.2d at 1227-28; *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *United States v. Mosca*, 475 F.2d 1052 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973); *cf. Taglianetti v. United States*, *supra*, 398 F.2d 558; *United States v. Lebron*, 222 F.2d 531 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955).

In the instant case, the Government's actions can not be properly characterized as "lawless" or "ruthless beyond justification." Mr. Bloom was given an opportunity to hear the tape prior to appellant's trial. The May 30, 1973 meeting was not requested at the Government's behest but by Mr. Bloom and his client. In addition, the conversations were not recorded in anticipation of obtaining information about defense strategy nor was any such information ob-

^{*} See also *Black v. United States*, 385 U.S. 26 (1966); *O'Brien v. United States*, 386 U.S. 345 (1967).

tained. *United States v. Brown, supra*, 484 F.2d at 424-25. At the time this meeting occurred, appellant had months earlier pleaded guilty to a narcotics violation, was supposedly cooperating with the Government and was due to be sentenced just two days after the meeting. Further, at the time of the meeting, the Government was aware that Mr. Diskin's attorney was not to be a party to these conversations. The Government could not therefore have anticipated discussions at that meeting concerning trial strategy, since no trial was scheduled or expected. The sole reason for recording of this meeting was that testified to by Special Agent Hall—a belief that an attempt would be made by Mr. Bloom and appellant to convince Stephen Diskin, in the absence of his attorney, to lie about the extent of appellant's cooperation with the Government.*

Finally, it is undisputed that when the May 30, 1973 meeting took place, appellant and his attorney were aware that Stephen Diskin had some months earlier agreed to cooperate with the Government. This case therefore differs dramatically from those situations in which unbeknownst to an attorney and his client, their private conversations are taped or those in which an informant is placed in the midst of the defense camp. *Coplon v. United States, supra*; *Caldwell v. United States, supra*.

It has long been recognized that when an attorney and his client converse with third parties who are not agents of the attorney or his client, the conversations do not fall

* Appellant's pending information and indictment in no way established a Sixth Amendment bar precluding the Government from investigating separate and distinct crimes such as subornation of perjury or obstruction of justice. See *Massiah v. United States*, 377 U.S. 201, 206-07 (1964); *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir. 1971), cert. denied, 406 U.S. 948 (1972); *United States v. Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), cert. denied, 386 U.S. 908 (1967).

within the scope of attorney-client privilege. See *United States v. Andreadis*, 234 F. Supp. 341, 345 (E.D.N.Y. 1964) ; 8 Wigmore Evidence § 2311, at 601-02, § 2326, at 633-34 (McNaughton rev. 1961). As a corollary, when an attorney and his client converse freely with a co-defendant who is at the time of the conversations not a Government agent, the attorney and his client must bear the risk that the co-defendant will subsequently turn his loyalties to the Government and provide the Government with the substance of these conversations. See *United States v. Gugliaro*, 501 F.2d 68, 74 (2d Cir. 1974) ; *United States v. Rosner*, *supra*, 485 F.2d at 1226-27.

Here, as in the case of the turncoat defendant, appellant, not the Government, should assume the risk that his co-defendant, whom he knew had agreed to cooperate with the Government, would make available to the Government evidence of any conversations. A defendant and his attorney should not be permitted to rely on their subjective feeling that a man known to have promised cooperation to the Government will split his loyalties. Indeed, to accept appellant's arguments concerning a *per se* rule could lead to anomalous results. For, if a defendant could be granted a new trial or dismissal of this indictment whenever attorney-client conversations were communicated to cooperating co-defendants, would this not encourage defendants to transmit inconsequential attorney-client communications to codefendants known to be cooperating with the Government, so that if the defendant was later convicted, he could loudly trumpet a constitutional violation? *

* It should be noted that in no case cited by appellant has application of a "*per se* rule" ever led to dismissal of an indictment, the relief here requested by appellant. The sole remedy applied by the courts has been reversal of the conviction and a new trial. *O'Brien v. United States*, 386 U.S. 345 (1967) ; *Black v. United States*, 385 U.S. 26, 28-29 (1966) ; *United States v. Rispo*, 460 F.2d 965 (3d Cir. 1972) ; *United States v. Lusterino*, 450 F.2d

[Footnote continued on following page]

POINT II

Appellant suffered no prejudice as a result of the recording of the May 30, 1973 meeting.

It is plain that the conduct of the Government in this case has not been "ruthless beyond justification." Consequently, only if appellant has suffered some prejudice as a result of the intrusion is he entitled to any relief whatsoever. *Supra* at pp. 11-12. An examination of the facts surrounding this matter reveal that appellant has not sustained any prejudice.

Judge Stewart found, after a post-trial hearing, that the recordings of the May 30, 1973 conversations did not concern the facts of this case. No trial strategy was discussed, and, to the extent the conversations concerned appellant's withdrawal of his guilty plea, no prejudice resulted, since the court had granted appellant this relief.

572, 575 (2d Cir. 1971); *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953). While it is true that the extreme remedy of dismissal of an indictment has been countenanced in *dictum*, see *Hoffa v. United States* 385 U.S. 293, 308 (1966), this is plainly not that rare case in which the "alleged taint remains immutable." *United States v. Rosner*, 485 F.2d 1213, 1228 (2d Cir. 1973), *cert. denied* 417 U.S. 950 (1974). See Note, Government Interceptions of Attorney-Client Communications, 49 N.Y.U.L. Rev. 87, 96-97 (1974).

It would thus appear that the sole relief to which appellant is even arguably entitled is a new trial, "so as to afford [him] an opportunity to protect himself from the use of evidence that might be otherwise inadmissible." *Black v. United States, supra*, 385 U.S. at 29. But in this case the District Court has already correctly determined (see discussion *infra*) that appellant suffered no prejudice as a result of the taping of the May 30, 1973 meeting. It is therefore difficult to see how either the interests of justice or judicial economy would be served by applying a *per se* rule and granting appellant a new trial.

In *Taglianetti v. United States*, *supra*, 308 F.2d 558, an attorney-client conversation had been intercepted by FBI agents. The First Circuit refused to reverse the appellant's income tax evasion conviction, holding that "the fact of monitoring an attorney-client conversation without more—specifically, without a concession that the matter involved the alleged offense in question—[does not] require retrial" *Id.* at 570. The court observed that, "[o]therwise, an illegal wiretap on a conversation between a taxpayer and his attorney relating, for example, to a domestic relations problem would guarantee him a new trial in any criminal prosecution." *Id.* Here, as in *Taglianetti*, appellant suffered no prejudice when conversations, unrelated to the charges for which he stood trial, were made available to the Government. *Cf. United States v. Arroyo*, *supra*, 494 F.2d at 1323; *United States v. Mosca*, *supra*, 475 F.2d at 1060; *United States v. Brown*, *supra*, 484 F.2d at 425; *United States v. Cohen*, 358 F. Supp. 112, 127-29 (S.D.N.Y. 1973).

The Government's sole use at the trial of the transcript of the meeting occurred during the cross-examination of Mr. Bloom when, without defense objection, it was used in an effort to refresh Bloom's recollection. This effort failed to develop any contradiction in the witness' testimony, and Judge Stewart later found that the use of the transcript had failed to affect Bloom's testimony "in any material way."

It is well settled that the use of a document to refresh a witness' recollection does not put the document into evidence. The only evidence, after a witness' memory has been refreshed, is the witness' oral testimony. See *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 329 U.S. 806 (1947); McCormick, Evidence § 9, at 15 (2d ed. 1972), *citing Henry v. Lee*, 2 Chitty 124 (1810); 3 Wigmore, Evidence § 763 (Chadbourn rev. 1970); *cf. United States v. Burket*, 480 F.2d 568, 572 (2d Cir. 1973).

Accordingly, since no part of the tape or transcript was offered into evidence by the Government at appellant's trial, he can hardly be said to have been prejudiced. Cf. *United States v. Polizzi*, 500 F.2d 856, 911 (9th Cir. 1974), cert. denied, 43 U.S.L.W. 3403 (1975).^{*} Moreover, whatever error there might have been in utilizing the transcript to refresh Bloom's memory was clearly waived by the failure of the defense to object. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).^{**}

^{*} Also, by the time Mr. Bloom took the stand, he had clearly "opened the door," *United States v. Corrigan*, 168 F.2d 641, 645 (2d Cir. 1948), to questioning about the May 30, 1973 meeting through his extensive interrogation of Stephen Diskin and Agent Hall about the circumstances and substance of the May 30th conversations. Moreover, as soon as Bloom offered testimony regarding this incident he waived the attorney-client privilege for his client. 8 Wigmore, Evidence § 2327, at 637-38 (McNaughton rev. 1961).

^{**} Appellant also urges, citing *United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974), that the court exercise its supervisory power over the administration of justice and dismiss appellant's indictment. Where, as here, the Government's conduct clearly has been within the bounds of acceptability, the "extreme remedy of requiring dismissal of the indictment" pursuant to an exercise of this Court's supervisory powers would be completely unwarranted. *United States ex rel. Lujan v. Gengler*, Dkt. No. 74-2084 (2d Cir., January 8, 1975), slip op. 1197 at 1204-05, 1209 and n. 9. The supervisory power of the court is, after all, to be "sparingly exercised," *Lopez v. United States*, 373 U.S. 427, 440 (1963). Appellant ignores the admonition that "[t]he enforcement of the criminal law is not . . . a mere sporting game, and the hunters, as well as the hunted, have their problems." *United States v. Jones*, 433 F.2d 1176, 1182 (D.C. Cir. 1970) (McGowan, J.), cert. denied, 402 U.S. 950 (1971).

CONCLUSION

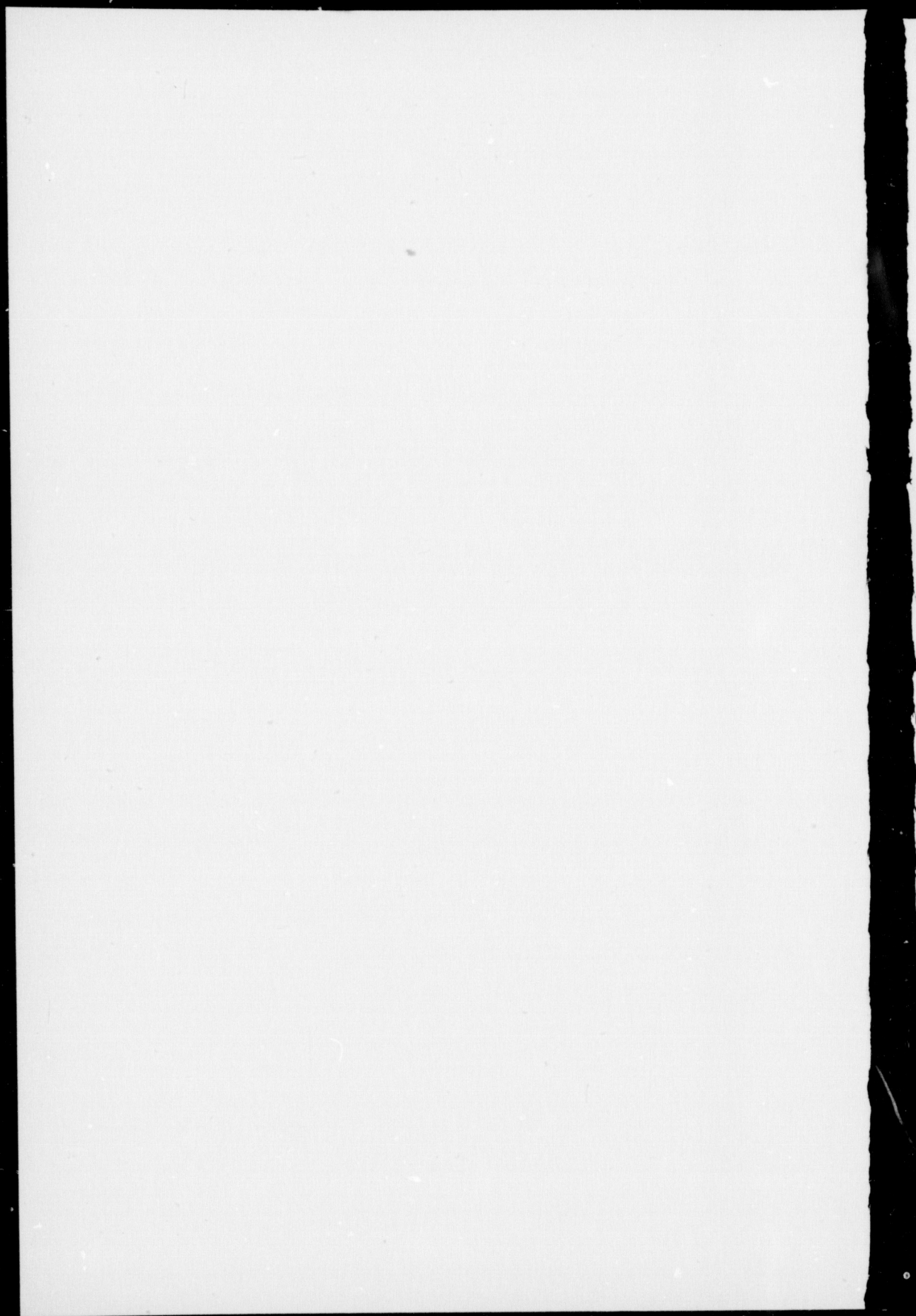
The judgment of conviction should be affirmed.

Respectfully submitted,

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APPENDIX



APPENDIX

Transcript of a tape recording of a conversation among Stephen Diskin, David Gartner and Attorney Robert Bloom in Diskin's apartment on May 30, 1973.*

G: You understand what I'm saying?
D: (inaud)
G: You understand what I'm saying?
D: I understand.
G: (inaud)
D: (inaud)
D: (inaud) I can't believe the conversation, I, I mean
I really can't. I, I can't fuckin believe you did it.
And if he said it, why did he say it? Why did he
say it.
G: It doesn't make sense to me.
D: It doesn't make sense to me either. I don't know,
I don't know. (inaud)
D: (inaud) how you doin Bob?
G: (inaud)
D: They don't—
G: (inaud)
D: Na they don't, that's bullshit. They only do that
with Frank Costello and Al Capone (inaud)
J: (inaud)
D: Jan darling, I tried, I couldn't get it for you.
J: Oh no.
G: Hi (inaud)
D: Hey you got another drink dear?
D: In a way I do, you know, (inaud) and Jeff, not
Jeff, Dave and, so I, so I says to them, listen, you

* B—BLOOM;
D—DISKIN;
G—GARTNER.

*Transcript of a tape recording of a conversation among
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know, you know I can't lie to your attorney, you know, so I said, you know in a way what I really, you know, without actually saying no, I said to him, listen (inaud) maybe and maybe, you know, you know, maybe you couldn't get next to Toby for one reason or another (inaud) and maybe you didn't really know Mike Morton, but that's between you and I, you and I man.

G: You told that to Bob (inaud)?

D: Not over the phone, not in so many words

G: Yeah, yeah

D: Not in so many words. I mean you know, I said but whatever I said it was between you and I. You know, me and you Bob, and Dave, period. McDonald know nothin, Jeff knows nothin——

B: (inaud)

D: So I don't know (inaud) said you had something to do.

G: Yeah (inaud)

D: I said Bob I'll be here all night for you, if you want me to sit here in a chair, I'll sit here all night. He says well, I'll call you back, and——

G: Yeah

D: What the fuck are you talking about, I got one day to go and you said——

G: Yeah, yeah, alright, that's why it's important, I want to (inaud)

D: That's why I'm here.

G: Yeah.

D: And Ken knows nothing about nothing (inaud) you know, Dave will keep on with that story (inaud) you know be up a tree but a, but the thing that I'm, can I be honest with you, the thing that I'm worried about (inaud)

*Transcript of a tape recording of a conversation among
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Ken knows nothing about nothing, you know I figure that he is my attorney I should tell him something, what's going on.

G: Yeah, but let's wait, I mean if you don't know what's happening how can you tell the man and then call him back and say everything I said forget.

D: Right.

G: It's this way now.

D: Yeah, yeah.

G: You understand?

D: Yeah. (inaud) can't have those things, you know, what have you done? And I told them, I told them, you know like when he got back from Japan a couple of days ago, you know, I called him up about, you know, my martial problem I'm having one now, and um, you know he said now Steve I want to know, you know, what's happening. He said I want you to, you know, kinda (inaud), and a, so I kinda read it down to him in a way, the best I could over the phone, you know, and he like, he didn't, you know, seem to think that much of it, you know, he said is there a way, we want to know, like (inaud).

D: (inaud) and I said yeah (inaud). He said well—

G: Bob, I have

D: (inaud)

G: Bob, I have a, a hundred percent faith in whatever he says.

D: (inaud) Verci alright hey, sit down now.

G: Bob, let me say,—a hundred percent faith (inaud) and he doesn't understand

D: Alias Steve McQueen, you ever seen me on my motorcycle?

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in Diskin's apartment on May 30, 1973*

- G: Anyway, he doesn't believe what I told him, what McDonald said.
- B: (inaud)
- D: (inaud)
- B: (inaud) either he's been getting, maybe he's just acting like a creep on his own, or the agents have been telling him stuff that isn't true. They've been telling him other than what I've understood to be true for some time. Um, let me ask you a question——
- D: Go ahead.
- B: Do you recall there came a time when McDonald talked about part of what you and David had to do would be not only to tell all you knew about Toby, but to talk about all of your past activities, OK, past criminal record——
- G: (inaud)
- B: Do you remember that? I don't want any coaching from you.
- D: Well, (inaud), alright I can
- B: Do you remember something like that?
- D: No, not especially. Not a, not especially.
- B: OK
- D: (inaud)
- B: A, do you remember whether there came a time that Sallaway spoke to him (inaud) alright just let them know about it and tell them about Toby and whatever else they want to do.
- D: That, I'll tell you something, now, now between the three of us, and Ken, that point was never clarified——
- B: Um, hum.
- D: Like at first I thought I'd only have to do the requir-whatever we knew about Toby, and then I

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kinda thought that well we just kinda maybe, maybe for insurance or for whatever, for lack of better phrase, let's say for insurance, let's try to get somebody else.

B: Well that's no problem. I'm talking about the other aspect about talking about any past criminal activities.

D: (inaud)

B: You don't remember that? In other words you don't remember one way or the other.

D: I, I really don't, I mean, I, I just don't remember.

G: Can I refresh that, maybe he will remember.

B: Yeah.

G: I remember when I was up very tight

B: I never saw this

G: Watch this, watch this, watch what happens here—this is a today it happened.

B: Today, yeah.

G: Yeah, today, watch what happens here

B: Oh God. Is that the Indianapolis?

TV: The wind foil on the back of the car fell off, just after that Savage's car slammed into the infield wall at about 100 miles an hour. On impact the car burst into flame and disintegrated. In the middle of your screen on the left, you can see where Savage is trapped in his automobile. Swede Savage miraculously is still alive at this hour. After they pulled him out of the wreckage he was sitting up on the stretcher. He's in critical condition in the hospital now, suffering from two broken legs and bad burns. While fire trucks were rushing to the scene to put the fire out in Savage's car, a crewman was hit by a fire truck and killed—

?: Oh, wow—

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- TV: Twenty three year old Orlando (inaud) of Culver City, California was thrown over fifty feet in the air after he was hit by a firetruck travelling at eighty miles an hour. They continued the race following the accident and Gordon Johncock was the winner of this year's Indianapolis Five Hundred. This year's Indy 500 claimed two lives and seriously injured——
- B: Howard Cosell said on the tube the other day, that that is like a very unsafe track, it was made for, for lower speeds and they just gather they can't
- D: They are, they are circuiting the track at over two hundred miles an hour.
- G: OK, let me, let me just go on with that question.
- D: Alright.
- G: I remember that I was up, very up tight
- D: Yeah.
- G: That they wanted me——
- B: I remember that too.
- G: to say about my past.
- D: Right.
- G: And I went over with you that that's not the deal we made, the deal we made was that we, a, just to discuss Toby.
- D: Look can I be can——
- G: Hold it, let me just finish.
- D: OK
- G: Then Sallaway saw McDonald and said all he wanted said us guys to work with them (inaud)
- D: Now Ken never said that, now Ken never said that. Our, my, our understanding was never directly from McDonald to us. In other words McDonald never said anything more. But David and I took it that all we had to do was say something about

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- Toby. So we met with some agents from Long Island, we met with some agents from Long Island, we told them what we knew about Toby, and then I don't know, somehow, somehow it snowballed. Just somehow, I don't know, it just snowballed, you know. It, it just fucking snowballed. It was as sim, sim——
- B: In your conversation when you've seen the agents a number of times without David, am I right?
- D: Not a number (inaud)
- B: Let's hear what he's saying. I want to hear what this fuck is saying.
- TV: I have no recollection of any such (inaud)
- D: Who is it?
- B: Ehrlichman.
- D: Who is Ehrlichman?
- B: (inaud)
- D: I'm a very unpolitical person. All I know is about farm votes, that's all I know.
- G: Bob, let's do this cause I'm really——
- D: The only thing I want to know is——
- B: OK
- D: Anyway
- G: You said about seeing the agents.
- D: Right
- B: Yeah now when you see them is it there, is it in fact their understanding, as far as you know, that David is (inaud)
- D: I have tried and tried to lead them to believe that (inaud) it started with two bartenders that worked at a place called Adam's Apple, O.K., a friend of mine cut me into them. I told the agents that Dave, what did I tell the agents?

*Transcript of a tape recording of a conversation among
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- G: (inaud) said that Dave, that a mutual friend cut us in on it. But Steve went with Jeff, with Sullivan.
- D: For some reason I said that Dave couldn't do it. I—why—I don't remember why I said that.
- G: Cause you didn't want to bring three people
- D: Right, we didn't want to bring three people into it, that would look like too many people.
- G: So Steve went with this guy Sullivan. It was like a mutual friend of Steve and I.
- D: And then came (inaud)
- B: Was Sullivan and the others—Do you think they went for that? Apparently they didn't and that's what happened.
- D: Now you see, now, now, now you're giving me like something in direct, directly contrary to what I believe, so naturally you're shaking my foundation, you are, you're shaking my foundation.
- B: as I say (inaud) being stupid where these guys and telling them that David
- D: I can't remember my, my, my initial interview/debriefing with everyone I saw you know, but I said that Dave knew these guys and I knew these guys and a mutual friend really cut us in, in the drug scene, like if we knew them, I don't remember the exact verbage, but a—
- G: Instead of three people knowing I stayed out.
- D: But my initial reaction was yes they believed us. That was my initial reaction. Evidently you feel something else now.
- B: And how about the thing with Mike what's his name?
- D: Morton.
- G: That they believe most of all (inaud)

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- D: Now evidently he believes differently evidently he believes differently
- G: How (inaud)
- D: I don't know——
- G: Involved with you, with the agents
- D: With Jeff
- G: With Jeff, with Jeff and Mike
- B: Which Jeff?
- G: Jeff Hall, agent. As far as Toby
- D: Tell (inaud) you got to know the story on Toby Ross already. That has been gone over a thousand times. Do you or do you want me——
- G: No
- D: Do you want me to clarify—Toby Ross is a colored a——
- G: He wants to know involvements more
- D: I'm just trying to tell you from this point. Toby Ross is a colored hoodlum and um Larry Shaw brought Toby Ross to the fore, so to say, um, that's what David and I pleaded guilty to—our involvement with Toby Ross, and a I just cut the agents into Toby Ross, it's as simple as that. And I told a——
- B: Did you introduce them to Toby?
- D: Yes, I told them——
- G: And he made a couple of meetings with them with Toby.
- D: One, yeah one meeting
- G: One meeting with Toby
- D: I told——
- G: But they understood that I could not go.
- D: I told them that David could not go because Toby does not particularly care for David as an individual, so it would be kind of ludicrous——

*Transcript of a tape recording of a conversation among
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G: He threatened my life—

D: You know to have somebody that Toby doesn't care
for try to you know—

G: Didn't he threaten my life.

D: Yeah I think he said he was going to break your
(inaud)

G: Kill me.

D: Kill you, break your (inaud) whatever

G: (inaud) as much as I can to bring him to Toby at
(inaud) house but I couldn't go any further, is
that right?

D: Now as far as Mike Morton goes, Mike Morton is
a guy that I know. Mike Morton is involved in
the drug scene. One way or another he's involved
in the drug scene. And I felt, I felt, Dave and I
both felt that we needed an insurance bust, what-
ever you want to call it, an insurance bust. So,
now you correct me when I kinda veer from the
truth.

G: (inaud) the truth.

D: Alright—I met Mike as did David. I told, I told—

B: How did you get to Mike?

D: Well Mike and I know each other, Mike and I just
know each other, you know we just know each
other, it's as simple as that. And Mike and I we
got in the car the three of us, and we ran down—

G: What time?

D: Ten. We got in the car and a we just sat and I
told Mike I told the truth, I had to tell him the
truth, and a—

B: First time?

D: First time, I had to tell him the truth. I said you
know I told him there's a federal problem and a
you gotta work with David and I, and a you know

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as if we're settin you up or something like that. And he looked at David, now this is strictly between you and I. He looked at David, and I know Mike, and he looked at David, and, and a he's looking at David, you know, just like he saw David before (inaud) needs federal problems, you know. And David, David said now he's going to get up tight immediately, because a number one he doesn't know me, and number two what are you giving me federal problems, you know, a normal reaction. So like we ran down a story that David knew him and this and that, met him at Playboy, met him here, I don't remember what we told him——

G: Yeah

D: (inaud) David met him at Playboy when you were working there

G: Yeah

D: And a he was, he was (inaud) he would, and a

B: He knew then?

D: Well a, we warned him, yeah we warned him, you know we warned him, your bringing goods. I'm, David and I are supposed to be setting you up.

B: Did he ever meet the cop?

D: Yeah, well this was later on in the story. Alright, so we have about an hour conversation. We take——

G: Home town (inaud)

D: Yeah—We take a ride, a ride out to Queens to see somebody that I had to see, take a ride back, and in the interim we do drum up a story that we're going to pretend that these goods, whatever they may be, a, are going to be coming in (inaud), and a who called Jeff? Oh I called Jeff——

G: Right.

*Transcript of a tape recording of a conversation among
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- D: I called Jeff Hall. We stopped on a parkway at a booth pay phone.
- G: Can I stop here a second? Let me just go back just for thing, remember you're at the phone booth.
- D: **Right.**
- G: I specifically remember as far as Sallaway is concerned, let me just go back to one thing, that I knew that McDonald wanted me to talk about my past and I refused that——
- B: I remember that, that was we were going out (inaud) your birthday.
- G: Yeah, yeah.
- D: We gotta be going back a year now.
- G: Yeah. And I know that Sallaway told Steve and Steve told me that within the hour, that he says forget about the past all they want you to do is to start to work with the buys——
- D: Right, Ken Sallaway's exact words, and I think that Ken will, will verify this, his exact words (inaud) were very brief, he said, "be honest with them."
- G: That's it, be honest——
- D: Be honest with them, that's about six words, I think, be honest with them.
- G: Work with the guys.
- D: Be honest.
- G: (inaud) told me.
- D: That's exactly what Ken said, he said be honest with them.
- G: And the Feds never asked me about my past.
- D: Like Ken said, if you want to go to trial I'm an Attorney I'll go to trial. If your going to work with them be honest with them. He said don't like, you know, cut the mustard in the middle.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
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- G: But understand McDonald never called me in again.
D: He never called me in again either.
G: Right and the Feds never asked me about that again because I thought that was understood already, at that point.
D: Well but Ken never said that to anybody but us.
G: Yeah but he said like a, he said (inaud) he told me——
D: He said if you want to go to trial go to trial, if you don't be honest with them. Don't cut you know, don't cut it in the middle somewhere. Don't play——
B: (inaud) McDonald never called to see him again.
G: He never called to see me again.
B: He never asked you about that.
G: Never. Because like that's right after Sallaway told me forget about you know, forget about the past, the most important thing is that you work with the guys and be honest with them. This is what I remember.
D: Right.
G: Because remember McDonald, McDonald wanted me to speak with him and he never asked me again, never asked again.
D: Exactly, be honest with the agents—alright where am I? I'm at the phone booth and we called Jeff, and a——
G: We called Jeff that we picked him up a little while ago.
D: We picked him, we just picked him up at the airport, we told him that we just picked him up at the airport and a
G: We'd like to meet with you——

*Transcript of a tape recording of a conversation among
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- D: Right, we just picked him up at the airport and we'd like to meet with you, so we did meet with him.
- G: And we all sat in the car.
- D: Yeah, we all sat in the car.
- G: And Jeff was questioning me like hey Dave, hey Steve—
- D: Remember Jeff was pretending to be a narcotics dealer.
- B: Where'd you sit in the car?
- G: 72nd Street and First Avenue, on 72nd.
- D: You know Jeff wasn't identifying himself, he was you know posing a narcotics deal.
- B: Of course.
- D: And a, I'm just trying to tell you exactly where the situation was. And a you know, like Mike, Mike Morton was a little hesitant, you know, you know like he wanted you know, I know Mike, you know so he says, you know like Dave you're such a fuck, you know he's a fuck. Because he tried to bullshit Mike. He tried to bullshit Mike. Now you correct me if I'm wrong. Now let this little motherfucker correct me if I'm wrong. He said to Mike Morton, my friend, he says to Mike Morton, do you remember when I met you at the Playboy Club? I know Mike Morton has never been to the fuckin Playboy Club. So he says to Mike Morton, he says to Mike Morton, now you remember when I met you at the Playboy Club. Mike looks at me and says, like I can read in his eyes, Steve I've never been to the fuckin Playboy Club.
- B: This was when Jeff was in the car?
- D: No, no, no, this is before we're cooking up the story. He looked at and he says, like he didn't say it, but

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I saw it in his eyes. He said Steve I've never been to the fuckin Playboy Club.

G: Steve, Steve, I thought that was the story I was telling him. I didn't say a——

D: But this is my friend how can you tell him a story?

G: I was telling him that's where we met.

D: He's telling him that's where we met.

G: Yeah, yeah.

D: And Mike's looking at me and saying I've never been to the Playboy Club, and you're telling me I met you at the Playboy Club.

G: Alright I understand.

D: So anyway, so finally I say hey Mike just say anything, just say anything, just fuckin say anything, just to meet Jeff say any bullshit story, involve Dav somehow and say it and get out of town. And that's exactly what happened. And Mike could be in Alaska.

G: Yeah but understand, understand the thing about tellin him that Jeff bought it at the time.

D: I think he bought, I think he bought it. You know nothing is a hundred percent. I believe he bought it, I believe he bought the story. I think he felt that a Mike was bringing a package in and I think he believed that Dave was connected with Mike, you know, connected, connected with the set up. Evidently you feel differently. Evidently

B: Not that I feel that, I just hope the agents—
(inaud) I don't know what they've been saying, I don't know what they think.

D: Well I'll tell you, as far as the agents go, I would like, I would like and Dave you correct me if I'm wrong—and if you wanta do it tonight, maybe to—

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morrow, tomorrow, you know tomorrow's all we have, Fri, Friday morning is Friday morning.

B: We might be able to adjourn it.

D: I can't, I can't, I can't, I can't anymore, I can't anymore, I can't

B: Why?

D: I can't, and neither can you.

B: See you don't have a problem.

D: No, no I, no the judge only said to me Steve you can get twenty five years, that's all I have. That's the only problem I have—is twenty five years of my life. In fact that's the only problem I have.

B: It's a small part of your problem.

D: Right I know its

B: You're young man.

D: I know, twenty five years is twenty five years (inaud)

G: Did McDonald say there's no problem with Steve?

B: He didn't say.

D: Do you want us, the only agent that I would half-way trust is Jeff Hall. Do you want to speak to him? You don't want to speak to him?

B: Yeah I do want to speak to him.

D: I don't know how to get hold of him, I'll call up the office in the morning if you want—

B: I'll tell you I want to speak to McDonald first, Jeff might be (inaud) See I now have—

D: Well you want to speak to Jeff on the QT in any way?

B: Aw come on how could I speak to—

D: I don't know, I'm asking, I don't know, I don't know, cause—Could we speak honest with—

G: With Bob?

D: Yeah of course with Bob.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- G: A hundred percent.
- D: Alright, you know like those agents on Long Island said that we're doing wrong, you know and a so maybe you could speak to Jeff say——
- D: Maybe we could speak to those agents on Long Island.
- B: Wrong, wrong
- G: That would be the same thing.
- D: You know alright
- G: Sure
- D: OK
- G: 100%
- D: A 100%?
- G: Steve whatever you say to me you can say to him.
- D: Alright, Dave said that those agents on Long Island said that we're assholes for not pulling our plea. Assholes. Not maybe an asshole——
- G: And you can verify it, you can verify it with Larry.
- D: Not maybe an asshole. He said you guys those agents on Long Island are are not maybe, you guys are the biggest assholes——
- B: (inaud) Why?
- D: in the world
- G: Why, because we, there's no proof they pulled, they pulled the trial, we didn't ask to pull the trial the last moment a the talking about George Stewart which they said that they had conspiracy they wanted, you know, like Larry wanted to give them somebody else. And they said we can't get conspiracy things that far back, and we don't have no proof.
- ?: (inaud)
- G: You understand? And they thought a, that's between us three you know, you know that we're a bunch of assholes.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

D: So, you know maybe that's what Jeff's saying. You know I don't know——

G: What do care about Jeff? Things like that (Inaud) you care——

D: Ah, fuck.

B: Well I'll tell you what I'm going to do tomorrow. First I'm going to——

G: Can, can I ask you one thing——

B: Hold it——

G: Going back to that Toby thing

D: Forget about that Toby thing for a second

G: No, no that was the thing that I wanted——

D: No, I don't trust—Wait, wait let me just say what I have to say. I don't trust Larry Shaw, OK. OK, I don't trust Larry Shaw. I think he's a scumbag. I don't think he's a man, I think he's a scumbag and—so there's nothing more that I can say. I think he's a scumbag, OK.

G: That's between us three——

D: Do you agree with me?

G: (inaud)

D: (inaud) I'll tell him to his fuckin face, I don't give a shit. I'll tell him right to his face, I'll—I'd like to knock him out this motherfuckin window to tell you the truth, and I'd love to, love for him to be here right now. I love to. Well anyway that's beside the—I think Larry Shaw is a scumbag, OK, but——

G: Because he brought up Toby.

D: Not because he only brought up Toby, cause he's a scumbag. But that's beside the point. Larry Shaw said that these agents said that we are assholes. No if ands or buts. Now should I believe

*Transcript of a tape recording of a conversation among
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- Larry Shaw? Do you believe Larry Shaw? Do you believe these agents said that? David says—
- G: Hey now this is between us, I don't want to get Larry involved in it.
- D: Forget about Larry for a second, I asked David, I asked David.
- G: Larry would be mad that I told anything to him.
- D: Wait, this is not going to Larry, this is just to Bob. I asked David, let me go to those agents. If those agents would say it to my face, I'll pull my plea right now.
- D: I'll go to McDonald's house right now.
- B: That's not right cause agents don't like necessarily (inaud) They really don't.
- D: But I would, but if those agents did say that, that would be good enough for me,—to pull it. That would be good enough for me. But am I going to believe Larry Shaw?
- B: I would believe, yeah, I would believe that.
- D: But can I believe Larry Shaw? And David says you can believe it, but I'm believing David because Larry Shaw is telling David, but I want to hear it from the source. Can you blame me for that?
- B: No.
- D: OK.
- B: Not based on what you feel.
- D: Right, OK, fair enough.
- ?: OK
- G: Let me ask one question to Steve—
- D: Go ahead.
- G: Steve, up to now make believe you didn't know anything that Bob said today at all.
- D: Alright.
- G: Begin today.

*Transcript of a tape recording of a conversation among
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D: Go ahead (inaud)——

G: *If I was to ask you Steve, listen we're going to court Friday.*

D. *Right.*

G: *Do feel that a, that we've cooperated with the agents. Have the agents said anything bad against me in any way?*

D: *My understanding has been this—Everything those bartenders, those two bartenders, Toby Ross and what his name——*

G: *Morton.*

D: *Mike Morton—I have told the agents that you knew these people. Now look just between the three of us. We, we know that David didn't know the two people. But I cannot—in anyway——*

G: *Except Ross and the connection of the bartender, but he really told it to you.*

D: *Right. But I can't see that the agents would see me lying. There's no way in the world that I could, that I could believe that they would know I was lying. That is no way I, I mean there's just no way that I could believe that they were lying. So I don't understand what, what a Cullen McDonald says. I don't understand. There's no way that they would know that that he really didn't know Mike Morton. There's no way that——*

B: *Maybe they regard it as irrelevant. What they regard as, as important is actual (inaud)——*

D: *But evidently he's placing a lot of credence on it.*

B: *Yeah.*

D: *Evidently he's placing—irrelevant——*

G: *What kind of participation when a, a, Steve would have been happily taking me along with the bar-*

*Transcript of a tape recording of a conversation among
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- tenders if there wouldn't have been a fuck up. By taking too many people.
- D: Now David, look, lets, lets be honest.
- G: Yeah.
- D: These bartenders, we may have to go to court and testify against these bartenders. Like David didn't know the bartenders.
- B: Um-hum.
- D: You know, a friend of mine——
- G: No I said I know the friend
- D: Right.
- G: That's what I said I don't know the bartenders. I'm not lying to Bob. We know the friend, the mutual friend who set it up I said.
- D: Right.
- G: That's what I said.
- D: A friend of mine, I went to a friend of mine and said I wanta start setting some people up, period. And he said alright I know one guy that deals in coke. It happens to be two bartenders or two employees——
- G: You never knew the bartenders.
- D: No.
- G: I didn't either. I'm saying I knew the mutual friend. That's what I'm saying.
- D: But I told Jeff that Dave was in on it from the inception, and he couldn't go there cause it was I don't know, too many people in the car, some bull-shit story, whatever it was.
- G: Steve evidently really has helped me.
- B: I believe that.
- D: But evidently Cullen, you know like you're telling me now something at the last day and can I be hon—you know like Ken doesn't know anything about it, you know Ken doesn't know nothing.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- B: He doesn't care.
D: He doesn't care?
B: He doesn't care.
D: He's got to care. What do you mean he doesn't care?
B: He doesn't want you to go to jail, but he doesn't care about the details.
D: Oh that's nice.
B: I'm serious.
D: You and him and Larry Shaw now, right?
G: That will blow his mind.
D: Ken's got to care about me.
G: Steve.
B: He doesn't want you to go to jail, he cares about that.
D: Right.
B: But I say he doesn't care about the details of how
D: I guess not
G: (inaud)
D: (inaud)
B: Alright well what I'm going to do tomorrow—
D: How you feeling darling?
J: Oh, not very good.
D: Do you know Bob Bloom?
B: Yeah we met. Hi, Jan how are you?
J: Hi, how are you? Yeah I remember you (inaud)
B: A, first I'm going to speak to McDonald.
D: So you're going to be at McDonald's tomorrow.
B: I want to speak to—I want him to speak to Jeff on the phone or in person (inaud) and put it right to him.
D: Can I ask you what you're going to put to him. Should we go to Jeff together, you think?

*Transcript of a tape recording of a conversation among
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- B: Let's save that for tomorrow. The next thing I'm—
D: Or should—
B: If things aren't working out, I'm gonna go to the judge.
G: Steve, Bob will not hurt you.
D: No, no I don't think you're gonna hurt me.
G: He's trying to help me. He feels your safe. He feels I'm not.
B: That's pretty much true.
D: Can I ask you something, why do you feel that? Why do you feel that when David and I pleaded guilty we stood together in a court and both pleaded guilty.
B: Oh but like McDonald will say different things about the two of you.
D: Why?
B: They'll say where as Diskin participated bla bla and said this and did this—
D: But I told (inaud) stories to the agents, they gotta believe those stories, right?
B: But apparently they don't, apparently they don't. Or if they do they still regard and they like take a very simplistic view as to—
D: You mean the actual physical involvement (inaud).
B: Yeah, that's right. I suspect that that's it. Now let me just finish, let me just finish this. If I don't like whatever's happening, whatever happens with McDonald, whether I like it or not, I'm going, I'm going to see the judge's secretary, and I'll try to feel out what she—
D: Now, now David, not disrespect to yourself, OK, fair enough, David has mentioned that to me, that you do have kind of an ear ear to the to the, she has a sympathetic ear—

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- B: Yeah, she's alright.
- D: Oh you know, kind of synthetic ear. Does that mat—I mean does she know anything? Can she know anything?
- B: No, I don't know what she may know.
- D: I mean in others words, can she—would, would it do any good to listen to her? She's, she's a fifty dollar a week secretary. What does she know?
- B: She's not a secretary, she's a law secretary. She's not a typist.
- D: She's not a typist?
- B: She does his law work.
- D: I mean I'm picturing a fifty dollar a week (inaud) they answer the want ads, you know and—
- B: No, dig it, she's the one in the foyer that like does all his work for him. That's—A secretary is not just a good—a clerk is what she really is—
- D: Vera come over here, come on Vera.
- B: She's his clerk, (inaud). A, and beyond that, I will ask a, I'm going to tell her if things are not going well, a I'm going to make a motion to withdraw your plea. I'm goin to tell her that that I'm goin to do that a on Friday.
- D: Now can I ask you this? Can a plea be withdrawn—
- B: On the morning (inaud).
- D: No, no, no, no that's not what I was trying to say. Can a plea be withdrawn accapella? Or does a judge have to say, well Bob I feel it can be, or well Bob (inaud).
- B: Oh, oh, I see
- D: Does a judge have to make a ruling?
- B: Yeah, he does.

*Transcript of a tape recording of a conversation among
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- D: In other words its not a kinda accupella thing. I withdraw the plea and that's it.
- B: No, not at all.
- D: It's not, the judge does have to say OK Bob (inaud) on a Friday morning to do it. (inaud) be there Friday morning.
- B: I'll explain the whole background to him.
- D: In other words you would do it at sentencing.
- B: I want to tell her in advance that I'm going to do it, and tell her the reasons.
- D: I don't know what the fuck to do.
- G: Let me ask you something——
- B: In a strange way you have more of a problem——
- D: I do have a problem, I don't know whether I'm comin or goin.
- B: (inaud) if that happens because (inaud) if McDonald's goin to fuck around, it's pretty clear what you have to do, but it's not clear what you have to do, because McDonald's.
- D: If McDonald's goin to fuck around he's goin to pull his plea and that's it, cut and dry——
- B: Right.
- D: And that's the end of the story.
- B: Right.
- D: And you go to trial.
- B: But as for you, I mean you're in a different position. Your case is very easy to be on trial.
- D: I'm not goin through any trials. I am—at this stage, after a year——
- B: Hold it you have no——
- D: I don't do not have the intestinal fortitude to go through a trial.
- G: If you can beat it?

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- D: I don't have (inaud) you know hey listen—Oh man.
G: Steve, be, be a man for a moment and, and think about it.
D: How can you say I'm not being a man?
G: I'm not—Bob is not (inaud) to pull the plea.
D: *Do you think it was easy to go, to go to fuckin Jeff and those assholes over there and, and lie to them like that and say year you know, and thinking that—and don't you think that I thought that they could catch me in a million ways, that Jeff knew this guy and Jeff, Jeff. Dave Dave knew this guy and Dave knew that guy. (inaud)*
G: Let me ask you something? Are you, are you angry at me?
D: Of course I'm not ang—Jesus Christ, what's the matter, angry at you.
G: Steve, if, if Bob if Bob could get the same thing like McDonald feels with you then I would do the same thing as you
D: I don't know (inaud)
G: But if he's goin to try to hang me, what am I supposed to to do?
B: Well, yeah, yeah—
D: Well no, you know I understand, no I understand I don know, you're missing the—
B: No David he doesn't have to—
D: missing the point
B: He doesn't have to adjourn (inaud)
D: I mean but don't tell me I'm not being like a man, cause I lied to these agents and its not an easy thing to lie to these agents
G: (inaud) yeah I know (inaud) I don't understand where that comes in, just tell me—

*Transcript of a tape recording of a conversation among
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- D: Cause you told me to be a man for a minute.
G: Yeah, now I don't mean it that way, Steve. I didn't understand, I didn't understand why you said that you lied to me and where does that go that I let you down somewhere.
D: It's not that you let me down, you're telling me to be a man for a minute——
G: I didn't mean that——
D: You said be a man for a minute
G: I apologize, I apologize, I apologize, I didn't (inaud) that way.
B: You know Steve doesn't have to withdraw his plea.
G: Yeah.
B: If he's goin to be alright there's no point (inaud) don't want to go through that crap.
D: Hey, does any normal human being want to go through a trial? Come on Dave, be honest.
G: I don't, I don't want to go through a trial either.
D: Of course not—So where do we stand, tell me, where do we stand as we didn't stand (inaud).
G: Can we just clear up one point.
D: Yeah.
G: This is a heavy point.
D: Yeah.
G: What did McDonald say to you about Toby?
B: He didn't really say. He said big deal so you told him about Toby. I said well they set him up also. I mean what's the status on that?
G: No, no, no hold it, hold it. Didn't you say that a—
D: That Dave told me that you said, Dave told me that you said somebody informed to McDonald——
B: Right, right, right——
D: That, that

*Transcript of a tape recording of a conversation among
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- B: Not informed right. And I don't really remember saying this.
- D: Well McDonald said that that—did you tell Dave, did you or did Dave, did Dave and Steve
- B: (inaud) tell Toby what was happening
- D: That's what McDonald said to you?
- B: He asked me that question.
- D: And you said?
- B: I said no.
- D: No
- B: I said what I did say is—a I mean I don't remember saying that, but what I did say is like 99.9% no, you know I wouldn't say that—
- D: If I had a 100% you never said—
- B: Maybe I talked to you about something like that and talked about people doing that like in other cases, or you know something like that.
- G: You didn't say that to him did you?
- B: No I didn't, no I said it like that, or some—you know, I didn't say that er possibly—
- D: (inaud) explain something, that when David, David first brouched the subject tonight, my immediate reaction, and David will verify this, was—
- G: I didn't—
- D: OK Toby is looking for us I've gotta, you know, you know, watch out for myself, you know, he's looking to kill me. Do you think it would be a smart, do you think—
- G: Do you think Toby knows something?
- D: A, er—
- G: Why do you say that?
- B: Because probably Toby is like suspicious and he hasn't gone through with it. May—Do you know what's happened with Toby in the (inaud)?

*Transcript of a tape recording of a conversation among
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D: I do not.

B: OK

D: I do not.

B: Probably nothing has happened——

D: Alright, I——

B: And probably McDonald——

D: I do know this——

B: is shooting in the dark.

D: I was assured that that I would be informed prior to his arrest. OK, I was assured that I would be informed prior to his arrest. But do you think that they——

G: You should deny it a 100 percent, you never said it.

B: I did deny it.

D: Would it be beneficial for us, for us to give Toby a hint a letter, a telegram, a Western Union over the roof somehow you know I mean I'm thinkin about for David and I, for our own self preservation in the end, cause David like said to me, "What are you worried about Toby for?" And I'm worried about——

G: I never said it.

D: the bang, bang thing. I'm worried about——

G: He's afraid that Toby knows something, and he's——

D: And is goin to come out with a pistol, that's what I'm—Do you think it would be beneficial for us to inform Toby?

D: I mean not inform him, but kinda hint at him?

G: No

D: You know, so I don't know where McDonald gets these ideas from.

G: What'd he come (out/up) with?

B: Well what happened was I'm sure, that Toby got . . . smelled these guys, that's what probably hap-

Transcript of a tape recording of a conversation among Stephen Diskin, David Gartner and Attorney Robert Bloom in Diskin's apartment on May 30, 1973

pened—he smelled them and backed out of any deal and a——

G: (inaud) they'll get Toby

B: and they decided that maybe Toby was tipped off by you guys.

D: Er, well—I don't know what to, I don't know what to. Can I ask something, where are we? Where are we? We're like in bad shape.

B: *You're not in bad shape.*

D: *I'm not in bad shape?*

B: *You're in pretty good (inaud), but David's situation is unclear.*

D: *In other words you feel McDonald feels that I've been a good guy and David's been a bad guy. Is that your feeling? Ya honestly feel that way? I mean what indication do you have toward that?*

B: *Just what McDonald said.*

D: *About what, about the Toby Ross?*

B: *He said David hasn't done anything.*

D: *He has said that.*

B: *Yeah.*

D: *I didn't know that. (inaud)*

B: *That's what I told you.*

D: *Oh yeah*

B: *Yeah, that's what I'm saying to you.*

D: *I didn't, I didn't know that.*

G: *But that's not true.*

B: *I know its not true. What's unclear is like there's anybody——*

G: *Lie or no lie, I mean, as far as they know it's not true.*

B: *Everybody hears from everybody else. What are you doing tomorrow afternoon?*

D: *Let me tell you something—working. I have——*

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- B: Where are you working?
D: Gobblers Knob, I, Gobblers Knob.
B: What's that a bar?
D: No it's a whorehouse. Of course it's a bar, yeah.
I'm a bartender.
B: When, when do you work there, what hours?
D: (inaud) what are you with the IRS now? What,
what, what's
B: (Inaud), no I want to know if a you can spend any
time with a, in McDonald's office tomorrow after-
noon. If McDonald——
D: I can spend—I'll tell you what I can spend time
there before ten, I'll be willing to meet there before
ten——
B: (inaud)
D: I can't do it after ten, I can't, I can't take another
day off of work. I'll be happy——
B: How late do you work?
D: To eight.
B: (inaud)
D: Yeah, I'll be happy to be there before ten o'clock.
G: Or after eight.
D: Or, or after eight, right. There's no way I can
take another day off of work.
G: Hey Steve
D: There's no way.
G: Know one thing, the way it stands now if I went
through with it I'd go to jail.
D: Not necessarily, went through with what? I mean
what do you figure——
B: Let me find that out tomorrow, OK? Where you
gonna be tomorrow?
G: Speaking to Toby, ha, ha.
B: Say (inaud)

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

G: I'll be available

D: And I'll be at Gobblers Knob from ten o'clock in the morning

G: *But I don't think I should go by myself, Steve is my whole backbone.*

D: *Why can't I go, why can't I go past eight o—prior to ten o'clock?*

B: *I can't (inaud). Um well that's alright I'll just have David there, and let them, let them, let Jeff say to David, "You weren't in the car with Mike what's his name."?*

G: *Morton.*

B: *Morton.*

D: *Now what, what points will Jeff try to get David on? Just maybe I can brief him on something.*

B: *What will he try to get him on?*

D: *In, in other words, if Jeff Hall is there—*

B: *David must—knows, knows everything you know except Mike's—*

D: *No, no how could he know everything*

G: *Steve (inaud)*

D: *How could he know everything I know, he never met Mike before. How the fuck could he know everything I know about Mike Morton?*

G: *I—OK, OK listen*

D: *You know, I mean, you know is there anything you want me to tell him? Is there anything that that Jeff Hall may ask him?*

G: *Where did I meet Mike.*

B: *I would suggest this, I would suggest this, why don't you two spend this time right here, an hour, a half hour, whatever it takes, and just talk about Mike as much as you can, talk about—*

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

D: *He's just, he's just a Southerner.*

B: *Talk about the three incidents as much as you can,
OK?*

G: But hold it, there's nothing to talk about with
Toby, you know where that's at. I could not go
up there because I was threatened.

D: OK, with the bartenders——

G: With the bartenders, I knew, I did not know the
bartenders, neither did Steve, a a friend, a mutual
friend of ours a discussed it——

D: Dave, now come on let's be honest just in case——

G: (inaud) a mutual friend, you know who I'm talk-
ing about.

D: Come on, come on, a friend of mine, I went to——

G: I don't know him?

D: You know him, but you wouldn't know him to, to,
to introduce you to somebody you wouldn't know
him.

G: Of course, but we know this.

D: Alright, I'm telling him, he doesn't know this.

G: Yeah, but a, I know the man.

D: I, Why the fuck are you hiding things from your
own attorney? God damn it.

G: What am I hiding Steve?

B: He's not hiding, he's not——

D: Alright.

G: I don't understand you.

D: Alright. Ah, I don't know, maybe——

G: I'm not hiding nothing.

D: Maybe I'm just going crazy. I don't know, maybe
I'm just going wacky.

G: The fellow with the mustache is a friend of mine
as well as yours, but he told you. What am I
hiding?

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- D: I'm trying to tell him everything that I know.
That's, that's—I'm trying to tell him everything—
- G: Yeah, but I'm not hiding anything.
- B: I'll tell you what, I don't need to know. He needs to know.
- D: Then——
- B: He needs to know.
- D: OK, then——
- B: He needs to know. That's what I want you to do.
- D: Because, because——
- B: You know what I'm going to do——
- D: Just in case that mutual friend would ever be called up for any reason and would look at you and say, "Who the fuck are you?"
- G: Do I know him?
- D: You know him but he would sa——
- G: Do I know him pretty well?
- D: But whata, oh——
- G: You know, that's all I said Steve.
- D: You know you're talking to me, you know, you know you're talking to me
- G: (inaud) hold again. I don't understand,
- D: Like I'm McDonald.
- G: I don't understand
- D: Oh, man.
- G: Steve, the story is that the, the guy who we're talking about, which we don't want to mention names, more or less——
- D: Sal, a friend of mine——
- G: Yeah Sal
- D: A friend of mine——
- G: More or less told both of us, but he really told you.
- D: Right.
- G: That's what—I'm not hiding that.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

D: But I want Bob to know this. But I want Bob to know this.

G: Yeah

D: That's what I'm saying.

B: He really told you

D: He told me. I was walking my dog in the park, I said Sal I got a——

B: He really told you and you told the agents that he told both of you.

D: That's——

[5 minute gap.]

B: Your cooperation may even be, be helpful to David in the following way——

D: Hey listen, let me, let me tell you something, let me set the record straight. If Dave Gartner goes to trial I will definitely appear as a witness. No matter where I am.

B: I'll tell you, with you as a witness it will be even more effective.

D: No matter where, where I am at that point in time, I will be in the court room on the specific day that they they call the roll.

B: (inaud)

D: Alright, well, you know. But I just, I mean I don't want to, naturally, you know, I——

G: Is there a way they would make a thing with Steve if he doesn't testify for me?

B: Can't do that (inaud)

D: No, I will be in the court room, I will definitely be in the court room on that day, I don't want to do it, naturally. But I——

B: We'll get you to do it.

D: Hey listen, you know——

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- B: Understand (inaud) should not, can not help the agents make any other cases or work with them in any way. You know that?
- D: No, I didn't know that.
- B: You cannot. You're not allowed to. It's all over (inaud) really. You didn't know that?
- D: No way. I mean not that I would want to work with the agents anyway.
- B: No, in other words they can't put the pressure on (inaud). And a, (inaud)
- D: Don't think that I wouldn't appear, appear there, if he went to trial. Don't think that I wouldn't appear there. It may take you a while to find me, and I may be in, you know, White Fish, Montana or somewhere, but I'll appear that, on that day. Yeah, I'll appear, I'll be in the courtroom that day. I don't know if you want to go through that trip, but if you want to (inaud)
- G: If McDonald says yeah everything's cool tomorrow I'll be with you.
- B: If McDonald (inaud)
- D: (inaud)
- G: Say that again
- D: (inaud)
- G: You understand
- D: I (inaud) of course
- B: I would rather (inaud) What it comes down to, I can't (inaud)
- D: (inaud) Is that the norm?
- B: Do you really want to know?
- D: That is the norm that he would say hey Bob——
- B: Well——
- D: You know
- B: It's the norm for me.

*Transcript of a tape recording of a conversation among
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- D: It is? (inaud) OK.
- B: I don't like to go into sentences without knowing what's going to happen. This is where they put the bug, you know that. (inaud) See it.
- D: I'll tell you what, I'll bet you everything that you own in the world, there's no bug in that, against that thing. What do you say? Don't even look at it anymore. I'll break the thing to smithierines, I'll bet you there's no bug in it—against everything you own in the world.
- G: (inaud)
- D: I know
- B: Why would I make that bet?
- G: Hey Steve—
- B: As Marlon Brando said (inaud)—
- D: Joey your pigeons, your pigeons Joey (inaud). You know who I met today, Jake LaMotta's brother.
- B: Guys and Dolls.
- G: You know I know Jake LaMotta.
- D: I met his brother today, his brother came in today.
- G: I a, I did a film with him.
- D: A film with Jake LaMotta?
- G: As a killer
- B: (inaud)
- G: Do you know how he gets killed?
- B: He can bet that (inaud)
- D: (inaud) get your ass up lousy and jump out of my bed
- G: Bob, let me just make a point there. Do you feel in your mind that Toby Ross knew something—that a problem, that I had a problem
- B: No, maybe suspects—

*Transcript of a tape recording of a conversation among
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D: But that maybe the norm, I mean but that's the norm in any——

B: Yeah, which has nothing to do with anything.

G: (inaud) but nobody said nothing

D: *Alright. Do you fe—So in other words your aa—I'm trying you know I'm, I'm even trying to think what ot tell Ken too. In other words your doubts lie that the agents didn't swallow the bullshit that I told them about David.*

B: *No, no I think that they believed that David had knowledge of what was going on——*

D: *But (inaud)*

B: *But without active participation that's not good enough for them.*

G: Well I did one.

D: But I mean, but I, I bullshited to these agents so good, I mean how the——

B: Wait a minute. You, your not hearing. That's not enough. In other words they believe, assuming they believe——

G: But let me ask you something

D: Hold it Bob, wait a second

B: About David's knowledge, knowledge and encouragement and moral support isn't enough—A, you gotta actually be there in the trenches.

G: But how can I go with Steve?

B: I understand that, wait a minute, I understand that. We all understand that, they understand that. If there—Hey look by definition these agents are narrow minded creeps, man, and their reasoning is not exactly the most intelligent reasoning in the world. They're like very narrow——

D: I will say this though——

B: people.

*Transcript of a tape recording of a conversation among
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- D: Can I say this. You know I, I, I, have found, I have not had much, much conversation with any other agent——
- B: (inaud)
- D: Other than Jeff Hall——
- B: Jeff is very bright and understanding
- D: I believe, I believe Jeff Hall to be a reasonable, intelligent individual, I do, a reasonable intelligent——
- G: You even told me that (inaud) like me
- D: You know I feel that Jeff likes you, I mean, but be, a, understand he knows you broke the law, you know, you know, in, in other wo——
- G: What broke the law? Broke the law where?
- D: Well understand, he knows you know, you haven't been a perfect angel, as I have not been a perfect angel. You know, you know, you know you're not like a priest, you know, but, but I, but I believe him to be a reasonable intelligent human being. I mean, you know, now I could be, I could be conned by him and I could be bullshitted by him, but it's my belief, the other agents I don't know, with the exception of Sullivan who I only met once or twice on one case.
- B: Jeff Hall, is he a lead agent in that group?
- D: Sure he's an agent.
- G: He not——
- B: The lead agent.
- G: No
- D: I don't know what you mean by lead agent.
- G: Rod is the lead agent.
- D: Who is Rod?
- G: Rod
- D: I never——
- G: Ron, you know Ron.

*Transcript of a tape recording of a conversation among
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D: Oh oh Ron, oh Ron, is like like——
G: the supervisor
D: the boss, you know, you know Ron, you know, I, I
think Jeff is the a——
G: top agent
D: You know, yeah, yeah, Jeff is like, you know, the
leader of the group.
B: The leader of the pack.
D: I think so, yeah.
B: OK, I've had enough of you two criminals.
?: (inaud)
G: Steve is there anything you want him to say that
you want told to McDonald?
D: Yeah, get my passport out, I'm goin—I'm going to
Havana.
G: No did we get anything accomplished at all?
B: **Yeah**
D: Where are we going Friday?
?: I don't know I'm not going to worry.
D: (inaud) what are we doing Friday?
B: I don't know I'm going on vacation so (inaud)
?: Alright
G: Could you speak to Larry?
D: I'll see you Friday.
B: I'm going to speak to Larry, I'm going to call him
when I get home.
G: (inaud)
B: I think Cullen (inaud)
D: **Fuck him.**
G: (inaud)
B: (inaud)
D: When I pour a drink, I pour a drink.
B: Where is Gobblers?
D: **76th.**

*Transcript of a tape recording of a conversation among
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B: 76th and where?

D: First

G: You're making him feel leary. Why don't you just tell him I don't know what he's talking about, when a when you ask him these questions——

B: I might come by

D: Please do, please do.

B: That's all I'm talking

D: Bring your wife.

B: Bring my wife. I split with my wife, oh, three, four, five months ago.

D: No?

D: I didn't know, I'm sorry. Well OK, maybe I'm not sorry.

B: You are, I'm not.

D: Alright, I didn't know, I didn't know.

G: Um, Bob I gotta say is

B: Why do I have to come here to be insulted.

G: Bob, I gotta say one thing to you, first of all (inaud) back with you.

B: *I'm in too much of a hurry to wait and I want you to take your time and get the facts straight.* I really do, I don't want you to rush through it. And we're going to be in kind of a hurry, you know, a——

?: (inaud)

D: There isn't that, there isn't that much to rush through.

B: (inaud)

D: Alright, Bloom.

G: Bob, try to do it without me if you can.

B: (inaud) look at you.

G: Bob, try to do it without me if you can.

B: I'll try.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
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- G: You know, I'm sure a, you know, whatever you can tell him——
- B: I'll try, I know I prefer not to have you there with stupid McDonald, you know just a (inaud)
- G: I just don't like the man at all to see him.
- B: Ah, he speaks very well of you.
- D: He always did. As a matter of fact he always did.
- B: Who McDonald?
- D: Yeah, he always did speak well of David.
- G: He always said that he believes me and not him.
- D: He always thought that I was John Dillinger.
That's true.
- B: That's, that is true as a matter of fact.
- D: I don't know why.
- B: That is true.
- D: I haven't the foggiest.
- B: Now I remember that (inaud)
- D: Dave told me that. It's true. (inaud) Alright pal.
- B: See you Friday and bring a toothbrush.
- D: Don't be a smart ass. They won't let you keep a toothbrush, just your shoes. No they let you keep your shoes.
- B: Let me ask one more question then (inaud)
- D: What?
- B: The um, the other people, what's his name got a year, Jesse got a year.
- D: I don't know what did happen to the other guys?
- B: One guy got no time, the other, a couple others got two months, three months.
- D: There were so many people involved, you know, you know you lose track, who got where and why.
- B: McDonald got (inaud)
- D: McDonald
- B: (inaud)

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

D: I heard he was (inaud)
?: (inaud)
D: Alright, shut up (inaud)
G: (inaud)
B: (inaud)
D: Alright Bob I'll see ya.
B: (inaud) take care Steve
D: Alright Bob
B: (inaud)
D: Yeah, Gobblers Knob. Jan you wanta make some
coffee?
J: (inaud)
D: Alright. You want to make some coffee?
J: (inaud)
D: Huh?
J: Yeah that good
D: Come on Jan make up some coffee.
J: OK Hon
G & B: (inaud)
J: Wait a minute
?: (inaud)
G: Sal Veccio did not tell it to me, he told it to you.
I told Bob ten times in his office.
D: Alright, alright, alright. What else?
G: *Steve you misunderstood me, you know what I
mean? He knows I don't know Mike. I told him
I don't know Mike. I said I never met him in my
life. Steve is helping me. That's what I told Bob.*
D: *Alright, just as long as you haven't bullshitted Bob.
I don't wanata—*
G: *I haven't bullshitted Bob.*
D: *I don't want to tell the truth to Ken and then Ken
will look at Bob and Bob will look at Ken and say
what the fuck are these guys telling us, you know—*

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- G: I mean, but you did say this to the, the Feds?
D: Hey listen, I told the Feds that you——
G: OK
D: You know I bullshitted them and——
G: Let me just go over one thing.
D: If, if Jeff Hall didn't believe me then, you know,
no one's going to believe me.
G: OK, let me just say one thing, the story that you
told him is that I could not go up there, I drove
you there as much as I could——
D: Right.
G: Because he threatened to kill me that I insulted
his wife.
D: The story with the bartenders——
G: What do we, what do we do with Toby?
D: Nothing.
G: We did films. We talked about opening a black
magazine, we talk about doing pornography. Right?
D: I'm just trying to think of the bartenders, that,
that, you know——
G: Is that right with Toby? So I can erase that.
D: Erase Toby, erase Toby, from your mind for a
second. Let's just, I just trying to think of the
bartenders.
G: OK. The bartender. Let me tell you my story
now.
D: Yeah.
G: This is my story.
D: Yeah.
G: Regardless we know the truth. We told him, I told
him ten times before you got excited. I didn't
understand what you were saying. As far as the
bartenders, Sal Veccio spoke to you and I in the
park, this is as far as they're concerned.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- D: So alright, McDonald's concerned, Sal Veccio spoke to you in the park.
- G: In the park, that a, we knew him, we asked him, that we had a problem, that he could help us. Sal Veccio had nothing to do with nothing, and he was just trying to help us out. I did not go with you because there was too many people the guy would think that something was funny——
- D: You told that to Sullivan——
- G: You understand? I told that to Sullivan anyhow.
- D: Right. Now as far as whose the other guy?
- G: I never knew the people, the bartenders, neither did you, we both didn't know them, you know, until you met them and I didn't meet them because three people would start looking funny already when we had to bring Jeff in, I mean Sullivan.
- D: Now, now Mike Morton——
- G: I met Mike Morton around two years ago, a, stopped into Playboy while we were both working there. I met him, I didn't know really where he was at, I knew he was into certain things——
- D: Right.
- G: And a, he called you and we got together. That's where that's at. And we introduced him to him and we're waiting for Mike Morton to call back.
- D: We then introduced him to an agent Jeff Hall, a, a
- G: Steve I wasn't lying, you make me feel very bad——
- D: No.
- G: I told Bloom everything.
- D: It's not that I just want——
- G: I'm in trouble——
- D: make sure that Bob knows everything.
- G: Bob really feels you're not in trouble.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- D: Well that's good for Bob, but if I get sentenced to ten years
- G: Yeah
- D: Does he want to sit down for me?
- G: But you understand what I'm saying, he's just telling you his honest opinion.
- D: I know
- G: And Bob, let me just say something to you. Bob is involved with me anyhow, on a personal basis,
- D: I can, I can appreciate that——
- G: You understand, so it's not all business with Bob——
- D: I can, I can appreciate that——
- G: If I was to go away, Bob would feel very terrible.
- D: I'm sure of that.
- G: More, more than more of the rest of them.
- D: I'm sure Ken would feel bad if I had to (inaud)
- G: OK, no, I'm not trying to say, i just trying to answer the question, of like it's just business——
- D: Alright.
- G: It's not. And Ken would feel terrible also——
- D: Right.
- G: Because of Billy.
- D: Right.
- G: Let's face that. That's where it's at. So nobody's trying to con nobody. And, a, I just don't understand why you got so upset, because I told Bob this.
- D: You, you know on one hand——
- G: I was trying to tell the story as if I was talking to the Feds. That's the only difference.
- D: Fuck the Feds. You know (inaud)
- G: I may have to see the Feds tomorrow. That's the reason I was talking this way.
- D: Alright, OK.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- G: He knows the truth.
- D: OK. If you see the Feds tomorrow what are you going to say? Where did you know Mike Morton from?
- G: I met him at the, question me, OK?
- D: Alright, I'm a Fed. Where did you know Mike Morton from, where did you first meet Mike Morton?
- G: I met Mike Morton, a year and a half, two years ago.
- D: Where?
- G: At Playboy.
- D: What was your involvement?
- G: He, he knew Steve, I did not know, know Mike Morton at the time——
- D: What was your involvement?
- G: But then we met Steve's friends a couple of nights.
- D: You met them socially, did you have any drug involvements with Mike Morton?
- G: Never did, other than my——
- D: What led you to believe Mike Morton was involved in the drug world?
- G: Mike a, always mentioned a, that he can a get a lot a, get goods. Get coke and this and that——
- D: (inaud)
- G: If we knew, if we knew anybody who can do it, and we never did anything because we were not involved into it. But when this thing happened now——
- D: I wish, I wish I were with the DA's office, I could question you better, so I knew what the fuck to ask you.
- G: A, A, am I saying right?

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- D: I don't know, I don't know what a DA would ask you.
- G: But remember what I'm saying. Tell me if I'm saying wrong, if they question you.
- D: No, you know, if they question me, you know,——
- G: Just make my story right.
- D: Right.
- G: That's all I'm asking, you know what I mean? Now there's one thing that's unclear to me——
- D: What?
- G: Did we pick Mike Morton at——
- D: I'm so confused I can't remember Mike Morton from Toby Ross at this point.
- G: Did we pick Mike Morton up at the airport? What do we——How do we——
- D: How did we bullshit Hall? What the fuck did we tell Hall?
- G: We told him that we would pick him up at the airport.
- D: We told him that we picked him up at the airport, yeah, we told him that we picked him up at the airport.
- G: I don't know what plane he came in or whatever.
- D: Didn't I, didn't I bullshit to Hall something? That we dreamed up some——
- G: TWA?
- D: (inaud)
- G: No, that's important.
- D: Why should it be important, cause I, I used to know——
- G: How did we meet, in what terminal?
- D: (inaud) I don't know. Make up a terminal.
- G: TWA.
- D: Alright, we met him at TWA.

*Transcript of a tape recording of a conversation among
Stephen Diskin, David Gartner and Attorney Robert Bloom
in Diskin's apartment on May 30, 1973*

- G: Alright?
D: Alright
G: We met him at TWA.
D: TWA.
G: And, and he came——
D: Plane number you can't remember.
G: I don't know, I don't know, we met him outside we
didn't go in——
D: Alright TWA, right.
G: Around three o'clock.
D: Three o'clock in the afternoon, OK.
G: And then we go on Queens Blvd, and——
J: (inaud)
G: You jumped out in the car and called Jeff while I
was bullshitting——
D: Right.
G: With Mike.
D: Jeff met us at the car, and, and the three of us bull-
shitted Jeff Hall out of his pants, that's all.
G: That's the truth.
D: And fuck Jeff Hall, fuck him. I'm fucking tired
of hearing about Jeff Hall, holy shit. Damn, oh
God.
G: (inaud)
D: (inaud) she'll send you care packages.
G: Steve, if I gotta go to trial——
D: Yeah.
G: Would you not show up?
D: If I don't show up you'll know I'm in Asia, or some-
where. I swear to you, I, I, I give you my solemn
oath, that if you have to go to trial I will appear
in that court. I will appear in that court. My
solemn oath, my handshake on it. I mean I will
appear, no matter where I am, no matter where I

*Transcript of a tape recording of a conversation among
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am I will appear in that court. I'll be testifying for Cullen McDonald, but I'll be in that fuckin courtroom. No I swear I'll be in, I'll be in that courtroom. You got to find me first, but I'll be in that courtroom.

G: (inaud)

D: Oh, don't worry about it, Jesus Christ.

G: Cause I know, I know what you're doing——

D: I know I'm crazy——

G: Right after you get off, I know you're going to Colorado——

D: I'm going to Colorado, Albuquerque, Los Angeles, Miami——

G: Puerto Rico——

D: Puerto Rico, anywhere, anywhere——

G: Steve——

D: I'm going——

G: Steve, Steve——

D: Baby, I'm going.

G: Steve, it's important to me. If I know that you are going then I have to——

D: No, I'm not, I'm staying right at Gobblers Knob, unless I feel my life is threatened.

G: Yeah (inaud)

D: If my life is threatened, I'm going.

G: But you would come to help me?

D: Yeah of course. I'll be in the courtroom I swear. The, the only reason I would leave is if my life is threatened.

G: I don't want to go to court.

D: Of course you don't want to go to court.

G: (inaud)

AFFIDAVIT OF MAILING

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)
COUNTY OF NEW YORK)

ss.:

Lawrence B. Pedowitz, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 24th day of February
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

Robert Bloom, Esq.
350 Broadway
New York, N.Y. 10013

and deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

Lawrence B. Pedowitz

Sworn to before me this

24th day of FEBRUARY, 1975
Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975